

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

MARTINEZ D. WADE,

Petitioner,

Case Number: 02-73346

v.

HONORABLE ARTHUR J. TARNOW

HAROLD WHITE,

Respondent.

**ORDER GRANTING RESPONDENT'S MOTION FOR STAY
PENDING APPEAL AND GRANTING PETITIONER'S REQUEST
FOR RELEASE ON BOND PENDING APPEAL**¹

Petitioner Martinez D. Wade is a state inmate currently incarcerated by the State of Michigan, pursuant to 1998 convictions for involuntary manslaughter, receiving and concealing stolen property over \$100, and leaving the scene of a serious accident. He filed a habeas corpus petition with this Court. On March 9, 2004, this Court issued an Opinion and Order Conditionally Granting Petition for Writ of Habeas Corpus. In that Opinion and Order, the Court ordered that unless a date for a new trial is scheduled within ninety days, Petitioner Wade must be unconditionally released. Now before the Court is Respondent's Motion for Stay Pending Appeal and Petitioner's Memorandum in Opposition to Motion to Stay.

Federal Rule of Appellate Procedure 23(c) provides that, while a decision ordering

¹ Staff Attorney Mary Beth Collery provided quality research assistance.

the release of a prisoner is on appeal, “the prisoner must – unless the court or judge ordering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise – be released on personal recognizance, with or without surety.” The United States Supreme Court has held that this rule “undoubtedly creates a presumption of release from custody in such cases.” Hilton v. Braunskill, 481 U.S. 770, 774 (1987). That presumption, however, may be overcome in the district court judge’s discretion. Id.

The United States Supreme Court has held that a federal court should consider the following factors in deciding whether to stay an order granting habeas corpus relief pending appeal:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

A federal court may also consider “[t]he State’s interest in continuing custody and rehabilitation pending a final determination of the case on appeal . . . ; it will be strongest where the remaining portion of the sentence to be served is long, and weakest where there is little of the sentence remaining to be served.” Id. at 777. In the pending case, Petitioner was sentenced to ten to fifteen years imprisonment. He has served approximately six years of his sentence. The remaining portion of the sentence to be served depends upon the Michigan Parole Board. Petitioner may be eligible for parole in

approximately four years or may have to serve nine more years. *See* Mich. Comp. Laws § 791.234.

The Court considers the likelihood of the stay applicant's success on the merits. "Where the State establishes that it has a strong likelihood of success on appeal, or where, failing that, it can nonetheless demonstrate a substantial case on the merits, continued custody is permissible if the second and fourth factors in the traditional stay analysis militate against release. . . . Where the State's showing on the merits falls below this level, the preference for release should control." *Id.* at 778. The Court granted habeas corpus relief because Petitioner's trial was rendered fundamentally unfair by the prosecutor's misconduct. First, the prosecutor engaged in misconduct by eliciting testimony that a key prosecution witness was shot twenty-seven times shortly after Petitioner's arrest and suggesting that Petitioner had some involvement in the shooting when no evidence was presented linking Petitioner to the shooting. Second, the prosecutor engaged in misconduct by referring to a picture of Petitioner as a "mug shot," admitting Petitioner's mug shot into evidence, eliciting mug shot references from prosecution witnesses, and eliciting a reference to Petitioner as a "wanted felon." The Court found that Petitioner's attorney's ineffectiveness excused Petitioner's procedural default of his prosecutorial misconduct claims. The Court concludes that Respondent has not demonstrated a strong likelihood that the Court's decision conditionally granting habeas corpus relief will be reversed on appeal.

Considering the remaining Hilton factors, the Court concludes that Petitioner

Wade would suffer irreparable harm each day he remains imprisoned pursuant to a conviction rendered in violation of the United States Constitution. *See Taylor v. Withrow*, 2001 WL 902497 *3 (E.D. Mich. Aug. 2, 2001) (denying Respondent’s motion for stay pending appeal), *stay granted*, No. 01-1908 (6th Cir. Sept. 25, 2001); *see also Burdine v. Johnson*, 87 F. Supp. 2d 711, 717 (S.D. Tex. 2000) (remedying a prisoner’s confinement in violation of the Constitution “is the very essence of the writ of habeas corpus”). The Court also concludes that it would be a waste of judicial resources for the appeal to proceed in the Sixth Circuit Court of Appeals, while simultaneously requiring the State to retry Petitioner.

These competing interests may be balanced by granting Respondent’s Motion for Stay Pending Appeal and releasing Petitioner on bond pending appeal. Respondent’s argument against releasing Petitioner on bond is not persuasive. Respondent argues that Petitioner poses a danger to the public and to the prosecutor’s witnesses if released on bond. In support of this argument, Respondent states that “the chief prosecution witness, Jason Franklin, was shot prior to Petitioner’s trial, and that it was the *prosecutor’s belief* that Petitioner was behind the shooting.” Respondent’s brief in support of motion for stay at p. 2 (emphasis supplied). In the Opinion and Order Granting Habeas Corpus Relief, this Court concluded that Petitioner probably did not shoot Franklin and no evidence was presented linking Petitioner to the shooting. *See* Opinion and Order at pp. 15-16. In light of the Court’s foregoing conclusion, the prosecutor’s unsupported, unsubstantiated “belief” that Petitioner was behind the shooting provides no basis for the continued

incarceration of Petitioner pursuant to a conviction rendered in violation of his constitutional rights.

Accordingly, **IT IS ORDERED** that Respondent's Motion for Stay Pending Appeal is **GRANTED** and this Court's Opinion and Order Granting Petition for Writ of Habeas Corpus is **STAYED PENDING DISPOSITION OF APPEAL** in the United States Court of Appeals for the Sixth Circuit.

IT IS FURTHER ORDERED that Petitioner's request for release on bond pending appeal is **GRANTED**. Petitioner shall be released on a \$10,000 unsecured bond with conditions to report as directed to Pretrial Services, possess no controlled substances, possess no weapons, reside at the bond address, restrict travel to Michigan, and submit to drug testing and/or treatment as directed by Pretrial Services.

IT IS FURTHER ORDERED that, if the Sixth Circuit Court of Appeals affirms this Court's judgment granting a writ of habeas corpus, the stay shall automatically be lifted and the State must schedule a new trial within **NINETY DAYS** of the disposition of the appeal or Petitioner Wade shall be unconditionally released.

/s/
ARTHUR J. TARNOW
UNITED STATES DISTRICT JUDGE

DATE: August 19, 2004